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Alexander L. Stevas, Clerk

No. 83-300

IN THE

Supreme Court of the United States

October Term, 1983

CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER,

Petitioner,

vs.

NATIONAL AUDUBON SOCIETY, a corporation; FRIENDS OF
THE EARTH, a corporation; THE MONO LAKE COMMITTEE,
a corporation; and the LOS ANGELES AUDUBON SOCIETY,
a corporation,

Respondents.

**BRIEF OF AMICI CURIAE STATES
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA.**

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Question Presented.

Although the decision below dealt with other uses, this brief is limited to the following question:

Whether the California Supreme Court's decision subjecting vested appropriative water rights to revocation based on vague "public trust" criteria is a deprivation of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

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Interest of Amici.

Water is a scarce resource in the arid West. Early American cartographers often referred to the region as the "Great American Desert." Even including the relatively water-rich coastal states, states west of the 100th meridian receive on average one-fourth the available rainfall in the East.

This scarcity has led the western states to establish intricate systems to allocate available water supplies. These systems are based upon principles of prior appropriation which protect vested water rights as against subsequent water

users. Many years of experience in settling and developing a locale where sources of water are often located long distances from areas of need have both reaffirmed the need for and refined the operation of the prior appropriation doctrine as the controlling standard of water law in the West.

Recognizing the applicability of the laws and customs which were being developed in the West to manage water resources, Congress, by passage of the Mining Act of 1866, 14 Stat. 262 (1866), 43 U.S.C. § 661 (1970), and the Desert Land Act of 1877, 19 Stat. 377 (1877), as amended 43 U.S.C. § 322 (1970), approved past and future appropriations of water on public lands which had been made pursuant to local procedures. This Court later recognized the Desert Land Act as having severed the land and water estates in the public domain, directing that rights to water be established pursuant to state law and independently of rights to land. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). Even before the *Beaver Portland Cement Co.* decision this Court recognized that local appropriation rights were "rights which the government had, by its conduct, recognized and encouraged and was bound to protect." *Broder v. Natoma Water and Min. Co.*, 101 U.S. 274, 276 (1880). In various recent decisions this Court has reaffirmed the importance of the doctrine of prior appropriation and the validity and security of the water rights created thereunder. *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978); *Arizona v. California*, U.S., 103 S.Ct. 1382 (1983); *Arizona v. San Carlos Apache Tribe*, U.S., 103 S.Ct. 3201 (1983); *Nevada v. United States*, U.S., 103 S.Ct. 2906 (1983). In *Arizona v. California* this Court stated, "The doctrine of prior appropriation . . . is itself largely a product of the compelling need for certainty in the holding and use of water rights." 103 S.Ct.

This Congressional and judicial deference to and approval of western water law is appropriate since it is the stability and predictability of such law which has, in large part, made the West a socially inhabitable and economically fruitful region. The "first in time — first in right" rule of the appropriation doctrine protects existing economies which are predicated upon established uses while at the same time insuring maximum beneficial water use as defined by the public. The need for certainty led state systems to provide that competing water demands and public interest concerns be weighed *before* a water right is issued. The result is the time honored expectation that once perfected, appropriative water rights are permanently vested property interests which can only be revoked by abandonment or forfeiture. Thus the California Supreme Court's decision below is unprecedented in holding that the "public trust" doctrine provides a basis for revocation of state created water rights.

This decision could create chaos in the water right system in California. Additionally the reasoning of the court's decision could have ramifications in other states. Many conflicts exist west-wide between those who rely on off-stream diversionary water rights and those who support increased in-source use. If there indeed exists a common law "public trust" doctrine by which vested appropriative water rights may be suddenly revoked, then the foundation of the water management and allocation systems relied upon west-wide has been severely and detrimentally undermined.

If the California Supreme Court's decision is followed, it would mean that numerous state water right holders in the West would be faced with the possibility that the diversions on which they have relied to support their farms, orchards, businesses, and communities would be subject to revocation at any time based on vague "public trust" criteria which did not even exist at the time their diversions were

initiated. Additionally, based on the rationale that the appropriations were always contrary to the "public trust," it could follow that the taking of the rights for reapplication to "trust" uses would not be compensable. Because of these potentially serious adverse consequences of the California Supreme Court's decision, the *amici* urge this Court to grant the writ of certiorari sought by the City of Los Angeles Department of Water and Power.

REASONS FOR GRANTING THE WRIT.

BY APPLYING THE SO-CALLED "PUBLIC TRUST" DOCTRINE TO HOLD THAT VESTED APPROPRIATIVE WATER RIGHTS IN CALIFORNIA ARE REVOCABLE ON "PUBLIC TRUST" GROUNDS THE CALIFORNIA SUPREME COURT HAS DENIED THE CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

A. Vested Appropriative Water Rights Are Constitutionally Protected Property Interests.

The constitutions and statutes of the western states expressly encourage the fullest possible use of water for beneficial purposes and assure permanency and stability of appropriative water rights. Usually, such rights are established first as conditional rights, which allows time for construction of storage or diversion works necessary for water use. After such facilities are completed, and water is diverted through them, a water right is issued which is valid as long as the appropriator continues to put to beneficial use the water to which the right pertains and complies with any conditions in the right.

One of the important principles of the appropriation doctrine is that public interest criteria are considered and weighed before water rights are granted. The California Water Code gives the Water Board abundant authority for this purpose. See, e.g. California Water Code §§ 1243, 1243.5, 1253 and 1255. The same is true in other western states. Wells A. Hutchins, a recognized expert on Western water law, has written, "Nearly all the 16 appropriation-permit statutes contain specific provisions relating to the handling of prospective appropriations that threaten to prove detrimental to the public interest or public welfare." 1 Hutchins, *Water Rights Laws in the Nineteen Western States*, p. 409 (1971). Harm to the public interest can result in denial of an ap-

plication for a vested water right or issuance of a right with conditions designed to ameliorate the effect on the public interest. Of critical importance in the instant action is that the California Water Board had ample authority under California water law (under provisions now codified as California Water Code Sections 1253 and 1255) to weigh public interest values before granting vested water rights to the Los Angeles Department of Water and Power (hereafter DWP).

A fundamental attribute of the appropriation doctrine is that, once vested, appropriative water rights are constitutionally protected property interests. An early authority on water law commented:

A water right, acquired under the arid region doctrine of appropriation, may be defined as the exclusive, independent property right to the use of water appropriated according to law from any natural stream, . . . the right continues only so long as the waters are actually applied to some beneficial use or purpose; . . .

2 Kinney, *Irrigation and Water Rights*, pp. 1313-1314 (2d ed., 1912). In an exhaustive National Water Commission study the following statement is made:

. . . appropriation water rights are said to be usufructuary, or rights to take possession of the water and use it, as distinguished from property ownership of the corpus of the water. However, these rights are in the nature of property rights which are entitled to constitutional protection against impairment without due process of law . . .

Dewsnup & Jensen, *A Summary-Digest of State Water Laws*, p. 32 (1973) Under the heading "Right of Private Property", Wells A. Hutchins stated:

The appropriative right is a species of property — at the beginning of the development of water law in Cal-

ifornia — in the earliest years of statehood — it was established that the right which an appropriator gains is a private property right, subject to ownership and disposition by him as in the case of other kinds of private property (*Thayer v. California Development Co.*, 128 Pac. 21 (1912); (and other citations))

This view of the property nature of the appropriative right has been consistently taken by the western courts that have had occasion to pass upon or to discuss it (Citations include court opinions from Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Texas, Utah and Wyoming)

Valuable property — Not only is the appropriative right property — it is valuable property. In an early case, it was termed "a substantive and valuable property." In a recent one, "a property right of high order." (citations omitted)

1 Hutchins, *Water Right Laws of the Nineteen Western States*, pp. 151, 2 (1971) (emphasis in original)

The decision of the California Supreme Court below, holding that a vested appropriative water right may be revoked based on a determination that it is not in conformity with "public trust" values is unique. The court's result erroneously transforms the DWP water rights into temporary, revocable licenses rather than recognizing them as vested, property interests subject to divestiture only pursuant to clearly established rules of state water law. This characterization runs contrary to all applicable precedent and established law.

B. The California Supreme Court's Ruling Affected a Taking of DWP's Protected Property Interests.

Through various references in its opinion the court below acknowledged but rejected the contention that the result it reached was precluded by the vested nature of DWP's water

rights. (See Pet. App. 4, 29, 38, 43) The Court even went so far as to describe its actions as an attempt "to clear away the legal barriers which have so far prevented either the Water Board or the courts from taking a new and objective look at the water resources of the Mono Basin." Pet. App. 51. By law the Water Board took an "objective look" at the Mono Basin and its water supplies before granting DWP vested rights to water in that Basin. More importantly, one of the "legal barriers" the California Supreme Court may not "clear away" to provide for reconsideration of those rights is the Fourteenth Amendment of the United States Constitution, specifically the due process of law guaranteed therein.

In the following listed decisions this Court has described the point at which the change in status of title to property through the ruling of a state court rises to the level of an unconstitutional taking. In *Enterprise Irr. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 146, 164 (1916) this Court stated that if the ruling "is so certainly unfounded that it may properly be regarded as essentially arbitrary" then a taking has occurred. In *Fox River Paper Co. v. Railroad Comm. of Wisc.*, 274 U.S. 651, 656 (1927) the test was articulated as whether the ruling presents a "novel view" inconsistent with earlier state court decisions. In *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 543 (1929) the test was described as whether the ruling so departs from established principles as to be without substantial basis. And, in *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944) this Court stated that if a state court ruling "fails to rest upon a substantial basis" property has been taken.

Application of any of these definitions of a taking by a state court leads to the conclusion that the decision below affected an unconstitutional deprivation of property and is

ripe for review by this Court at this time. The decision is arbitrary in that it seeks, at the expense of all reasonable expectations, to "clear away the legal barriers" (including established precedent) which prevent the taking of the DWP water rights. It is novel in that it departs from established principles to the extent that it is unique among appropriation doctrine cases. And it fails to rest upon a substantial basis and in fact is predicated on a principle foreign to appropriative water law.

Essentially, the holding transforms a vested property interest into a revocable license to use. Thus, DWP's vested title is downgraded to a defeasible title. This divestment of title is a taking of property. See *Abbleby v. Delaney*, 271 U.S. 403 (1926); *State of Indiana ex rel Anderson v. Brand*, 303 U.S. 95 (1938); *Wood v. Lovett*, 313 U.S. 362 (1941). Regarding the ripeness for review of the instant case this Court's recent decision in *Nevada v. United States*, U.S., 103 S.Ct. 2906 (1983) is instructive. No actual reduction of water rights had yet been effectuated in that case. However, loss of the *res judicata* defense, portending *potential* future diminishment of vested appropriative water rights, was considered worthy of immediate review by this Court.

The decision below goes beyond DWP's water rights and subjects *every* water right in California to perpetual contestability on "public trust" grounds. This is contrary not only to California's historical protection of perfected appropriative water rights as vested property interests, but also to the law of the other appropriation states. (See A above). The theory, utilized by the court rested on a misconstruction of this Court's ruling in *Illinois Central Railway Co. v. State of Illinois*, 146 U.S. 387 (1892). The court reasoned that the DWP water rights have always been subject to the "public trust", their reapplication to "trust" uses, there-

fore, apparently does not require purchase or condemnation. The end result is that the court has transformed DWP's vested property right into a defeasible interest constituting a taking of property for which no compensation is to be paid. The due process clause of the Fourteenth Amendment forbids such confiscation.

C. The Taking of DWP's Vested Property Rights Is Contrary to the Interests of Sound Public Policy.

Determinations as to the use of water in the West involve a delicate and complex balancing of benefits and costs associated with each competing use of water and area of use. These decisions have a significant effect on the development of the state, as they shape the priorities for water uses between the state farmers, cities and industries, and between these uses and competing environmental uses. In carrying out these responsibilities, states have developed the statutory and administrative mechanisms to allow full consideration of the public interest, including information regarding competing uses.

California water law provides extensive protection for public interest values. California has delegated to its Water Board the responsibility to see that public interest criteria are met when water rights are granted. This was done pursuant to state statutes and the state constitution. In the present case the Water Board, carrying out its statutory obligations, had the legal responsibility to consider public interest values before granting DWP vested water rights.

In challenging these rights, the plaintiff's below could have alleged that the diversions or uses of water were unreasonable or non-beneficial. Although incorrect, such claims would have had a basis in California water law. (See California Constitution Article X, Section 2.) Instead the plaintiff's primary contention was that the DWP rights were out

of harmony with the "public trust." The California Supreme Court was convinced by the plaintiff's contentions. The effect of the court's decision is to place a vague common law doctrine in a controlling position over an intricate state statutory scheme *and* specific state constitutional language. Although the "public trust" has been used to invalidate questionable legislative acts (*i.e.* the Illinois legislature's grant of nearly the entire outer Chicago harbor to a railroad company — *Illinois Centray Railway Co. v. Illinois*, 146 U.S. 387 (1982)) never has the purpose of the "trust" been to invalidate the express will of the people as manifest in specific constitutional language. Clearly, this Court never intended such a result when it decided *Illinois Central*. The California court would have a common law "public trust" doctrine supercede state constitutional and statutory provisions. If this approach were indeed correct, then no water right in the West would be truly vested or ever become so. Rather, every holder of water rights, even rights for highest priority municipal needs, would be plagued by questions of when and for what expanded "public trust" uses such rights could be revoked.

Sound public policy argues against such a result. The West has been developed on the expectation that appropriative water rights are valuable and permanent property interests. The system which has been developed to grant those rights provides a process to protect public interest values. It is now too late to be reconsidering every right previously granted for compliance with the ever changing "public trust." This is especially true when such reconsideration may lead to the taking of vested property rights without compensation.

Conclusion.

The States of Idaho and Wyoming joined herein as *amici* assert that the decision below of the California Supreme Court effectuates an unconstitutional taking of property in

violation of the Fourteenth Amendment of the Constitution of the United States. The possible unsettling ramifications of the decision are of further concern. For these reasons and those described above the *amici* respectfully urge this Court to grant Los Angeles' petition for writ of *certiorari*.

Respectfully submitted,

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